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No. 05-1269

In the Supreme Court of the United States

EXIDE TECHNOLOGIES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

REPLY BRIEF FOR PETITIONER

TIMOTHY K. LEWIS
ROBERT L. COLLINGS
CARL A. SOLANO (*Counsel of Record*)
JENNIFER J. NESTLE
Attorneys for Petitioner

SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
(215) 751-2202
Of Counsel.

TABLE OF CONTENTS

Page

REPLY 1

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT MANDATING APPLICATION OF STATE LAW TO FILL GAPS IN FEDERAL STATUTES 1

II. THE DECISION BELOW INCORRECTLY DECIDED AN IMPORTANT QUESTION REGARDING CERCLA LIABILITY BY DISPLACING GOVERNING PENNSYLVANIA LAW WITH A FEDERAL RULE THAT IS AT ODDS WITH STATE POLICY 2

CONCLUSION 6

TABLE OF AUTHORITIES

Cases *Page*

Ametek, Inc. v. Pioneer Salt & Chem. Co., 709 F. Supp. 556 (E.D. Pa. 1988) 5

Berg Chilling Sys. v. Hull Corp., 435 F.3d 455 (3d Cir. 2006) 5

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) .. 1

Bryant, Griffith & Brunson, Inc. v. General Newspapers, Inc., 36 Del. 468, 178 A. 645 (Del. Super. 1935) 4

EEOC v. Vucitech, 842 F.2d 936 (7th Cir. 1988) 4

Empire HealthChoice Assurance, Inc. v. McVeigh, No. 05-200 (June 15, 2006) 1-2

Fehl v. S.W.C. Corp., 433 F. Supp. 939 (D. Del. 1977) 4

Saco River Tel. & Tel. Co. v. Shooshan & Jackson, Inc., 826 F. Supp. 580 (D. Me. 1993) 3

Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) 5

Suarez v. Sherman Gin Co., 697 S.W.2d 17 (Tex. App.), *writ ref'd, n.r.e.* (Tex. 1985) 3

United States v. Keystone Sanitation Co., 1996 U.S. Dist. LEXIS 13651 (M.D. Pa., Aug. 22, 1996) 5

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 2

Wilson v. Fare Well Corp., 140 N.J. Super. 476, 356 A.2d 458 (Law Div. 976) 4

Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J. Super. 61, 703 A.2d 06 (App. Div. 1997), *appeal dismissed*, 157 N.J. 537, 724 A.2d 799 (1998) 4

Other Authorities

In re Certification of Questions of Law, 560 Pa. DCIII, 30 Pa. Bull. 519 (Jan. 12, 2000) 6

Supreme Court of Pennsylvania Internal Operating Procedures

IOP 10, 210 Pa. Code § 63.10 6

REPLY

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT MANDATING APPLICATION OF STATE LAW TO FILL GAPS IN FEDERAL STATUTES.

The Government certainly is correct in noting (Gov't Br. at 10) that this Court has not previously addressed the precise issue of successor liability under CERCLA that is presented by this case. That is why this Court's review is needed. Contrary to the Government's argument, the fact that the decision below therefore cannot be in conflict with a prior decision of this Court *on successor liability under CERCLA* does not mean that the decision below is not in conflict with any prior decision of this Court. Rather, the Court of Appeals' decision in this case conflicts with an entire series of precedents by this Court mandating application of state law in situations like that presented here, and that conflict calls for this Court's review.

The most recent of this Court's decisions in this series was decided just two weeks ago. In *Empire HealthChoice Assurance, Inc. v. McVeigh*, No. 05-200 (June 15, 2006), the Court held that federal common law does not displace the state law that is applicable to claims for reimbursement by plan administrators under federal health insurance contracts. Quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 & n.3 (1988), the Court emphasized that "the appropriate inquiry [focuses] on the straightforward question whether the relevant federal interest warrants displacement of state law." Slip op. at 11. Discerning no conflict between any federal policy or interest and state reimbursement law, the Court held that state, not federal, law controlled. *Id.* at 12. The Court rejected an analysis that would have the result turn on the federal nature of the contracts in general, rather than the need for federal law to govern the precise reimbursement issue presented by the case. *See id.*

The decision below is at odds with this analytical framework. It held that federal common law should govern recovery of remediation costs from corporate successors because, as a general matter, CERCLA requires uniform national standards, even though there is no conflict between state successor liability doctrines and any federal interest. A11-A17. The court below thus departed from this Court's instruction that "the prudent course" is "to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Empire*, slip op. at 11, quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979).

The Government acknowledges that the decision below "is arguably in tension with" this Court's decisions and "might appear, at an abstract level, to depart from this Court's general teachings." Gov't Br. at 12. That wording is oblique, but the reality that it seeks to mask is clear: the Court of Appeals' decision is in conflict with the decisions of this Court on use of federal common law to displace state law, and it therefore merits this Court's review.[1]

II. THE DECISION BELOW INCORRECTLY DECIDED AN IMPORTANT QUESTION REGARDING CERCLA LIABILITY BY DISPLACING GOVERNING PENNSYLVANIA LAW WITH A FEDERAL RULE THAT IS AT ODDS WITH STATE POLICY.

Despite the conflict between the decision below and

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1. The court's decision also is in conflict with the decisions of other courts of appeals, including the Sixth Circuit, which the Government's brief studiously ignores. *See* Pet. at 9-11; *cf.* Gov't Br. at 12-15. As the petition makes clear, Exide does not seek review of any conflict regarding application of the "substantial continuity doctrine" discussed in the Government's brief, but of a conflict regarding creation of federal common law.

this Court's controlling precedents, which resulted in the Court of Appeals' erroneous creation of a federal common law of corporate successor liability for asset purchases, the Government says that it opposes review here because the Court of Appeals' error "is of no practical importance." Gov't Br. at 15. This is because, the Government insists, a selection of federal common law, rather than applicable Pennsylvania state law, "would not change the result." *Id.*

The Government's cavalier assumption that Pennsylvania would follow the CERCLA successor liability law created by the Court of Appeals is unsupported by the Pennsylvania decisions and derogative of Pennsylvania's sovereign interest in determining for itself how to structure state corporate liability. Contrary to the implication in the Government's brief, all states' corporate liability laws are not the same – either in general, or on the question of *de facto* mergers. Some states have no *de facto* merger doctrine at all, *e.g.*, *Suarez v. Sherman Gin Co.*, 697 S.W.2d 17, 20-21 (Tex. App.), *writ ref'd, n.r.e.* (Tex. 1985); *Saco River Tel. & Tel. Co. v. Shooshan & Jackson, Inc.*, 826 F. Supp. 580, 582-83 (D. Me. 1993) (Maine law), while others apply the doctrine in different ways. *See, e.g.*, A14 (comparing differences between law of New Jersey and New York).

The Government's brief glosses over the differences by taking a "macro" approach that focuses on the use of a "four-factor standard followed by most States," Gov't Br. at 15, and declares this approach consistent with Pennsylvania law. But the Court of Appeals itself pointed out that any similarity in approach dissolves "when the general standards are applied in specific cases." A12 (footnote citing case examples omitted). Declaring that "[s]tate law does vary substantially on the issue of successor liability," the court observed, "Beneath a veneer of uniformity, the 'entire issue of successor liability . . . is dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake.'" A12-13, quoting

EEOC v. Vucitech, 842 F.2d 936, 944 (7th Cir. 1988). As the court noted, not all states emphasize "continuity of ownership," one of the four factors referenced by the Government, and disagreements regarding the issues presented by this case – whether liability should result from a "mixed cash/stock acquisition" or where the seller receives a small percentage of the buyer's outstanding equity – are illustrative. A12-14 & nn. 5-6, A23 & nn. 9-10. The court found "no generally accepted common law distinction" on these issues and declared the law at "this frontier of successor liability" to be "somewhat unsettled." A23.

In this context, the Government cannot represent that Pennsylvania will adopt the same solution to these successor liability issues as that adopted for this CERCLA action by the Court of Appeals. The Pennsylvania courts have not addressed the issues and have a variety of solutions that they may consider – informed, perhaps, by the approaches taken by Pennsylvania's neighbors. The New Jersey approach, for example, de-emphasizes continuity of ownership and follows a broad standard that permits liability in cash-only and mixed cash/stock transactions. *See, e.g., Woodrick v. Jack J. Burke Real Estate, Inc.*, 306 N.J. Super. 61, 74-77, 703 A.2d 306, 313-14 (App. Div. 1997), *appeal dismissed*, 157 N.J. 537, 724 A.2d 799 (1998); *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 484-93, 356 A.2d 458, 463-68 (Law Div. 1976). Delaware, on the other hand, largely forecloses *de facto* merger liability altogether where the sale price is not limited to stock. *See Bryant, Griffith & Brunson, Inc. v. General Newspapers, Inc.*, 36 Del. 468, 476, 178 A. 645, 648 (Del. Super. 1935); *Fehl v. S.W.C. Corp.*, 433 F. Supp. 939, 946-47 (D. Del. 1977). The Court of Appeals elected to follow the New Jersey model. *See* A23 & n. 9 (citing *Wilson*).[2] But Pennsylvania successor liability law already

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2. The court derived its rule from nine cases, one-third of which were decided under New Jersey law. *See* A23 nn. 9-10. It also cited two CERCLA decisions by federal district courts in

differs greatly from (and is much less expansive than) that of New Jersey. *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462-63 (3d Cir. 2006) (comparing differences). In fact, the Pennsylvania Legislature has endeavored to align Pennsylvania law on asset sales with that of *Delaware*. *See* Pet. at 15-16 (discussing authorities). In light of these authorities, the Government's speculation that Pennsylvania would follow the Court of Appeals' New Jersey-based federal *de facto* merger model is unfounded.

Of course, it is convenient – especially in the absence of direct state law authority – to assume that Pennsylvania law would conform to the Court of Appeals' decision. That assumption was made by the courts below, with no citation, analysis, or discussion of Pennsylvania authorities to support it. The Government, which, in litigating against Exide below, has advocated both federal common law and an expansive view of Pennsylvania law based (like the CERCLA law created by the Court of Appeals) on decisions of other states, would, of course, be advantaged by such an assumption. But such a view is an affront to the sovereign authority of Pennsylvania to decide its law for itself. If, as this Court's precedents teach, it is *state* law that should govern here, the Government may not impose federal law in its staid through a back-door assumption that Pennsylvania would not create a law of its own. If discernment of Pennsylvania law poses too great a burden

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Pennsylvania, which, of course, were bound under *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989), to apply federal common law. One of those, *United States v. Keystone Sanitation Co.*, 1996 U.S. Dist. LEXIS 13651, *10-*12 & n.5 (M.D. Pa., Aug. 22, 1996), stated explicitly that it was based on federal common law, and the other, *Ametek, Inc. v. Pioneer Salt & Chem. Co.*, 709 F. Supp. 556, 559-60 (E.D. Pa. 1988), said it was applying "the traditional common law test for successor liability" and made no specific reference to Pennsylvania law.

for the federal courts in this proceeding, Pennsylvania has a certification procedure that enables the Supreme Court of Pennsylvania to be consulted about the proper outcome. *See In re Certification of Questions of Law*, 560 Pa. DCIII, 30 Pa. Bull. 519, 520 (Jan. 12, 2000); Pa. IOP 10, 210 Pa. Code § 63.10. But unsupported assumptions about how Pennsylvania law might be determined cannot cure the Court of Appeals' decision or support the Government's effort to avoid this Court's review.

CONCLUSION

The choice of federal or Pennsylvania law to govern liability in this case *is* of practical importance — to the parties, and to the sovereign interests of Pennsylvania and the other states whose law the Court of Appeals has displaced. The Court of Appeals improperly departed from this Court's precedents in displacing state successor liability law and creating a law of its own. This Court should grant certiorari, vacate the decision below, and remand for application of Pennsylvania state law to the successor liability issue.

Respectfully submitted,
TIMOTHY K. LEWIS
ROBERT L. COLLINGS
CARL A. SOLANO
(Counsel of Record)
JENNIFER J. NESTLE
Attorneys for Petitioner

SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
Of Counsel.

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